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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

MISSOURI PACIFIC RAILROAD COMPANY, Plaintiff in Error, vs. E. W. PORTER and D. S. WEAVER, Doing Business as PORTER-WEAVER COMPANY, Defendants in Error.	No. 107.

REPLY OF PLAINTIFF IN ERROR TO BRIEF FOR APPELLEES.

1.

Congress, Through the Interstate Commerce Act, Has Assumed Jurisdiction Over Both the Form and Substance of Bills of Lading.

Counsel for defendants in error argues, in effect, that had the Carmack and Cummins Amendments been omitted from the Interstate Commerce Act at the time this ship-

ment moved the state statute prohibiting the insertion in a bill of lading of any limitation of common law or statutory liability would have been applicable not only to the inland portion of a shipment to a nonadjacent foreign country, but, likewise, to commerce between states. In support of this he cites and relies upon Ry. Co. v. Solan, 169 U. S. 133, and Ry. Co. v. Hughes, 191 U. S. 477.

This argument ignores the numerous changes that have been made in the Act since 1906 in addition to the Carmack and Cummins Amendments.

In contrast to the simple and limited statute that was under review in the Hughes case, above cited, we need only quote from subdivision 6 of section 1, as it has existed since February 28, 1920 (1920 Supp. Fed. Ann. Statutes, p. 95):

> "*It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe and enforce* just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and *just and reasonable regulations and practices affecting* classifications, rates or tariffs, *the issuance, form and substance of* tickets, receipts and *bills of lading*, the manner and method of presenting, marking, packing and delivering property for transportation," etc. (Italics ours.)

Unlike the Cummins and Carmack Amendments, Section 1, from which we have just quoted, is applicable to

the inland portion of a shipment to a non-adjacent foreign country.

Opposing counsel, on page 20 of his brief, has gone outside of the record to inform us that this cotton was intended to move in an English vessel, and that, therefore, Subdivision 4 of Section 25 of the Act to Regulate Commerce, which authorizes the Commission to prescribe the form of through bills of lading in connection with registered American ships, is inapplicable. If section 25 of the act stood alone, it might present a doubtful question as to whether Congress had intended to occupy the entire field respecting regulations to be contained in export bills of lading for use by both registered American vessels and foreign vessels not so registered.

But reading this section in connection with Subdivision 6 of Paragraph 1 of the Act, it is obvious that Congress has specifically and directly occupied the field with respect to the substance of bills of lading covering the inland portion of export shipments to nonadjacent foreign countries.

The Commission, by Subdivision 1 of Section 15 of the Act, has, since February 28, 1920, had authority to regulate and prescribe the rules and practices contained in such bills of lading (1920 Supp. Fed. Ann. Statutes, p. 107).

That the Commission may not have acted under this authority at the time this shipment moved in October, 1920, is immaterial, for, as stated by this Court in the

recent case of Napier v. Atlantic Coast Line, decided November 29, 1926:

> "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the act delegating the power. We hold that the state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field."

2.

No Consideration Needed to Support Such a Limitation.

Opposing counsel cites and relies upon the case of Ry. Co. v. Burke, 255 U. S. 317, in support of his contention that such a limitation must be supported by a reduced rate (Appellees' Brief, p. 34). The Burke case involved limitation of value with respect to damage occasioned by the carrier's negligence in connection with the inland portion of an import shipment moving during March, 1915. The amendments to the Commerce Act, by the Transportation Act of 1920, gave the Commission jurisdiction over the substance of the inland portion of bills of lading. Proof of some consideration or estoppel is, therefore, no longer necessary to support any valid common-law limitation which the Commission has permitted to become effective, for the element of risk is one of the elements that enter into rate-making. Congress, itself, could limit common-law liability, and the Commission, where such au-

thority is specifically delegated to it, can exert the same power. In doing so, the Commission is of course bound to respect the provisions of the Carmack and the Cummins Amendments, the provisions of the Harter Act, the provisions of the Federal Bill of Lading Act, and any other such specific enactments, but outside the scope of these particular acts, it has unlimited authority to prescribe the substance and regulations to be printed in bills of lading, and can determine for itself whether further rules should or should not be provided giving the shipper the option to ignore such regulations and ship at common-law liability.

This case does not involve a limitation respecting damage occasioned by the carrier's own negligence, but simply applied the same rule to the inland portion of this export shipment as was permissible under the Harter Act to the ocean portion, namely, freedom from liability for loss by fire occasioned through no negligence of the carrier (Rec., p. 7).

3.

Defendants in Error Are Estopped From Denying the Validity of the Bill of Lading Upon the Terms of Which They Must Rely to Make Out Their Case.

We deem it unnecessary to say anything further in support of the validity and application of Rule 1 of the Consolidated Classification.

Assuming, for the sake of argument, however, that opposing counsel is correct in stating that the bill of lading is void for lack of some tariff requirement, yet the fact remains that to make out their case defendants in error must rely upon this same bill of lading, a portion of which they attempt to repudiate.

The bill of lading in question under the facts in this case gave the shippers certain privileges and rights which were not accorded them at common law, and, at the same time, imposed upon them certain restrictions in the nature of limitations of the carrier's common-law liability. The acceptance and reliance upon the provisions of this bill of lading, which imposed upon the carrier a greater liability than existed at common law, estops the shippers from repudiating the provisions which restricted the common-law liability.

The bill of lading, which was signed by the shippers without protest, among other things provided that loss or damage to the shipment should be computed on the value of the property at the place and time of shipment (Rec., p. 10), and further provided that the carrier should not be liable for loss by fire (Rec., p. 9). The undisputed evidence discloses that the market on cotton during the latter part of October, 1920, was rapidly declining, and that the market virtually went to pieces immediately after the November election (Rec., p. 66). To settle on the value at time and place of shipment rather than on the value at Liverpool at the date this shipment was due to arrive

there, presumably several weeks later, was materially to the shippers' advantage. They accepted this bill of lading without protest, and, had the shipment been destroyed in a wreck, would have greatly profited by this provision of the bill of lading. The shippers not only accepted the bill of lading without protest, but here rely upon this provision of the bill of lading to make out their case, for the record is absolutely silent as to the value of this cotton under the common-law rule, namely, the value at destination at the time and in the condition that it should have been delivered. *Defendants in error have either failed to make out a case because of the lack of proof respecting the destination value of this cotton, or must invoke the aforesaid section 2 of the very bill of lading they are attempting to repudiate.* Relying upon the bill of lading for the purpose of obtaining an advantage that would not be accorded them at common law, the shippers are estopped from repudiating the terms of the same shipping contract which are to their disadvantage.

The reasoning of this Court, in the Burke case, 255 U. S. 321, applying the principle of estoppel to a shipper who is bound by a limited liability provision because of having accepted a reduced rate, is equally applicable to a case of this kind, where the shippers, to make out their case, rely upon certain terms of the contract which accord them greater rights, or, at least, different rights, from those they would be entitled to at common law.

It is true that our answer sets forth the provisions of the shipping contract fixing value as of the time and place of shipment (Rec., p. 3), and it is true that evidence of value at such time and place of shipment was admitted without objection. According to our theory of the case, the contract in its entirety is valid, and hence this was the proper measure of damages. But defendants in error, in the face of a declining market, and in utter absence of any evidence as to the destination value or the value at the time shipment should have arrived at its destination, cannot rely upon this saving clause of the shipping contract, and yet, in the same breath, maintain that the bill of lading in its entirety is a mere nullity because of some alleged tariff defect or for want of consideration. The shippers' acceptance and reliance upon the advantageous provisions of the bill of lading afford the same estoppel that would confront them had they accepted a reduced rate and then attempted to repudiate a limited liability contract that was coupled with that reduced rate.

Respectfully submitted,

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No. 107

IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

v.

PORTER-WEAVER AND COMPANY, *Defendant in Error.*

BRIEF FOR APPELLEES.

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IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILWAY COMPANY ..... *Plaintiff in Error,*

v.

PORTER-WEAVER AND COMPANY ..... *Defendant in Error.*

BRIEF FOR APPELLEES.

It will be seen that the bill of lading in question is in two parts, the first covering the inland haul by rail from Earl, Arkansas, to Brunswick, Georgia, being port A and the second part covering the ocean carriage from Brunswick to Liverpool being port B. The inland rate is 98½ cents, and the ocean rate $1.95. These are combined for convenience, but our laws State or Federal do not control the ocean carrier which in this case was the Leyland Line. Our concern here is only with the inland haul.

This part of the bill of lading contains an exemption from loss by fire and its legal validity is the first question which we wish to present to the court. Our Statute (C. & M. Dig.), provides as follows:

> "Sec. 843. Contracts abridging liability. It shall be unlawful for any railroad or any of its agents or employees to enter into an agreement or contract with

any shipper of any live stock, merchandise or other freight for the purpose of abridging, modifying, limiting, or abrogating the statutory and common law duties and liability of such railroad as a common carrier, and all agreements and contracts made for that purpose are hereby declared to be void, and the same shall not be enforced by any of the courts of this State. Acts 1907, p. 557, Sec. 1.

Sec. 844 declares void any rule or regulation limiting the common law rights of shippers.

It is clear that if this statute applies to the shipment in question the case must end here because it prohibits any contract or rule or regulation which limits the common law liability of a carrier and the bill of lading and regulation sought to be enforced here would so limit its liability because the loss was not from an act of God or the public enemy or other exemptions allowed by the common law. In other words by the common law the carrier would be absolutely liable for the loss of the cotton in question on account of its duty as a carrier. A great many States have provisions like this either in their statutes or constitutions, and their decisions have all been to the effect that such provisions absolutely prevent such limitations. The contention is made by Counsel that said statute does not apply to this shipment which was an export shipment, but that Federal laws govern and we now take up the discussion of that question.

The State of Iowa has a statute similar to it and in a shipment of cattle from that State to Chicago, Illinois, a loss occurred and the validity of that statute was called in question on account of a limitation of liability contained in the bill of lading; the statute was sustained, and the case was taken by writ of error to the Supreme Court of the United States. It is reported in *Ry.* v. *Solan*, 169 U. S., 133. The case was decided in 1898, long after the Interstate Commerce Act was passed requiring rates to be filed and to prevent discrimination by Railroad Companies, but before the Carmack Amendment was passed (which was in 1906) which amendment as we shall see lifted from the States all question of liability as to interstate shipments and placed them under Federal law, not however, affecting the old rule of the Government by State law insofar as lia-

bility for loss on the inland part of export and import shipments is concerned. In said last mentioned case the Supreme Court not only sustained the Iowa statute as having full force and effect in case of an interstate shipment, but also held specifically that the question of liability, (the loss having occurred in the State of Iowa just as this loss occurred in our State if that be material) was governed entirely by the State law. This case is a leading case and has been cited and approved in many cases in the Supreme Court. The court among other things said:

> "A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of non-feasance or of misfeasance committed within its limits. * * * The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

In addition to the Solan case in Iowa (28 L. R. A., 718) which was affirmed by the Supreme Court as stated there are many other Iowa cases sustaining the statute as applied to interstate shipments prior to the Carmack Amendment which we need not cite. See *Winn* v. *Express Co.*, 128 N. W., 663.

In the State of Kentucky where there has long been a Constitutional provision preventing such limitation by carriers the highest court has frequently held said provision valid as to interstate shipments prior to the passage of the Carmack Amendment, and as will be seen all such decisions are equally applicable to the inland haul of export shipments even up to the persent time. *Ry.* v. *Sanders*, 80 S. W., 488; *Lewis* v. *Ry.* 25 L. R. A. N. S. 938.

In Nebraska there is a similar provision, and it has been sustained in many cases in that State as applied to interstate shipments prior to the Carmack Amendment. *Ry.* v. *Palmer*, 22 L. R. A., 335; *Ry.* v. *Vanderveter*, 3 L. R. A., 129.

A similar provision exists in Virginia and similar decisions have been rendered by the highest court of that State holding said provision applicable to interstate as well as state shipments. In *Southern Express Company* v. *Keeler*, 64 S. E., 38, the court said: "It was the manifest purpose to relegate him to his common law rights and responsibilities independent of contract." *Ry.* v. *Pugh*, 64 S. E., 35, and *Ry.* v. *Beasley*, 3 L. R. A. N. S., 183.

In the same way the Arkansas statute has been applied in a number of cases involving State and interstate shipments. *Hafer* v. *Ry.*, 105 Ark. 310; *Ry.* v. *Ward*, 111 Ark., 102.

It is perfectly clear that said statutory provision will prohibit limitation of liability of a carrier where the contract of shipment is made in this State (and the loss occurs in this State which some cases hold to be material) regardless of whether the shipment is to be made to another State or to a foreign country unless the laws of the United States have intervened and superseded the State law on the subject. So the question we have now to consider is whether Congress has so acted upon this subject. As stated by the Supreme Court in the Solan case which was a case involving interstate commerce, state regulations on the subject do not interfere with interstate commerce and are not in conflict there-with until controlling statutes are passed by Congress. The same of course might be said of State regulations, in regard to foreign commerce. If the United States laws do not regulate or limit the action of the states in imposing liability on inland carriers of export or import shipments certainly no other laws would interfere. In *Liverpool, etc.* v. *Ins. Co.*, 129 U. S., the court said:

> "According to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citi-

> zens or residents thereof, and the performance of which begins there to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

In the annotation to *Ry.* v. *Hughes*, 63 L. R. A., 525, the writer says: (citing many cases.)

> "It is a well established rule that the validity of a stipulation, in a contract for transportation of persons or property from one state or country to another, limiting the carrier's common-law liability, is to be determined by the law of the place where the contract was made and the transportation commenced, without reference to the law of the place of destination, or to the law of the place where the alleged breach of contract or the loss or injury occurred."

We may now show the limitations which have been of late years imposed upon the states in the matter of liability of carriers in case of interstate shipments and those to and from adjacent foreign countries, but not affecting the States' power as to shipments like this. That field has been covered by the Federal Statutes and decisions and the State laws no longer apply as to liability for loss in case of such shipments, but unless there has been a similar limitation of the States in matters of liability of inland carriers of shipments like this, jurisdiction of the States in that respect must remain as it has always been.

In 1906 as a part of the Hepburn Act the Carmack Amendment was passed which proved to be very far-reaching in its effect, and as construed by the courts was the first Federal Statute which superseded the power of the States to control by Statute or judicial decision the question of liability of carriers of interstate commerce. That amendment is part of Sec. 20 of the Interstate Commerce Law, and reads as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any

common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Prior to the passage of that amendment the Solan case referred to was decided and also the Hughes case in 191 U. S., 477, which reviewed the legislation of Congress up to that time and held that it did not control the question of liability of interstate carriers. The court in Hughes case said that the acts of Congress up to that time provide:

"For equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places; for the publication of particulars as to charges, rules and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days notice to the commission; against reduction of joint tariff rates except after three days like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation." And then added that while under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight and has prevented carriers from obstructing shipments on interstate lines we look in vain for any regulation of the matter in controversy. (That is the matter of liability for loss or damage).

After the passage of the Carmack Amendment the Supreme Court decided various cases bearing upon its effect upon State laws, and in the case of *Adams Express Company* v. *Croninger,* 226 U. S., 491, a very full expression of opinion was given on the subject. The court after

quoting fully from the Solan case and the Hughes case and holding that prior to the Carmack Amendment the whole subject of the liability of interstate carriers was governed by State law, then took up the question of the effect of the amendment on the subject, and held that on all questions of liability of carriers for loss or damage to *interstate* shipments the laws of the State had been superseded by the Federal law. A great many other decisions of that court have followed the same line, and its effect never has been in the least disturbed. These cases held that contracts might be entered into by such carriers with shippers called released valuation contracts whereby the shipper by agreeing to a smaller valuation might obtain a lower rate, but they do not affect the rule established by the Carmack Amendment that interstate carriers cannot exempt themselves from liability for loss by fire or other causes not recognized by the common law. This released valuation practice was abused, and in 1915 the first Cummins Amendment abolished the practice in all cases, except where goods were concealed from view, thereby establishing the rule that interstate carriers could not contract against their common law liability for the full value of goods intrusted to them, and thereby doing away with released valuation contracts and all contracts like the one in question exempting from liability from loss of interstate shipments by fire and other exemptions not recognized by the common law. *Adams Exp. Co.* v. *Darden*, 265 U. S., 265. This statute was thought to be too drastic, and in 1916, the second Cummins Amendment was passed restoring the practice of released valuations provided a separate rate was issued by the authority of the Commission upon which each valuation was based, but making no change in the rule that prevented any contract exempting the carrier from its common law liability with the exception of certain kinds of property which is immaterial here. McCaul-Dinsmore case, 252 F 664, affirmed, 253 U. S., 97.

It will be observed that the Carmack Amendment is confined by its terms to *interstate* shipments. The Cummins Amendment enlarged its scope by including shipments to *adjacent* foreign countries, but said nothing about export or import shipments which pass from or to *nonadjacent* foreign countries. *It has been decided a number of times by the interstate commerce commission and by Federal and*

State Courts that the Carmack and Cummins Amendments have no application to these last named shipments. Hamlen v. *Ry.*, 212 F. 324. *Dexter* v. *Davis*, 281 F. (CCA) 385; *Fahey* v. *Ry.*, 114 At (Md.), 905; 52 ICC Rep., 671, In re Bill of Lading.

As stated, the very language of these amendments shows they have no application to the inland haul of export or import shipments. This statute and these authorities settle the case. The grounds for the writ of error are insubstantial, and we resisted its issuance for this reason. The writ should be dismissed. *M. K. & T. Ry.* v. *Sealey*, 248 U. S. 363. Nothing further need be said; yet to meet counsel's argument we go further. We may ask when and how has the jurisdiction of the State over the subject of liability of carriers of such foreign commerce to and from the port been taken away, and where has it been lodged? Opposing counsel states that this shipment is governed by the Federal laws as to liability for loss. We would like for him to point out the statute which has taken this matter away from the State. The statute we have cited has no application to interstate shipments as was held of the Iowa Statute (*Ry.* v. *Cramer*, 232 U. S., 490), but until he can point to a Federal Statute which has done the like as to the inland haul of shipments to or from non-adjacent foreign countries we must maintain that our statute is still intact as to that.

In *Liverpool, etc.* v. *Ins. Co., supra,* an export shipment from New York was held to be governed by the laws of New York as to exemption from liability for loss. The court saying: "The contract being made at New York, the ship owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract."

Under Section 2004 of "Traffic Law" a late work on carriers, the writer says:

> "The *liability* provisions of Section 20 (Carmack Amendment) do not apply to commerce between the United States and *nonadjacent* foreign countries, and this is true whether the inland movement is through two or more states or confined wholly within one state. *Commerce to non-adjacent foreign countries as far as*

> *the inland rail movement is concerned is governed by the rules of the common law* and the ocean transportation is governed by the act of Congress of February 13, 1893, known as the 'Harter Act'."

Of course the words "common law" as here used include State statutes like that in question passed in aid of the common law.

This is not saying that other parts of the interstate commerce law do not apply with all their force to the inland haul of a shipment like this. Requirements for publishing rates and to prevent discrimination and other provisions of the Federal Act apply to a shipment like this from one state to a port in another state for exportation. In Traffic Law, at section 3037A, the law in this respect is stated as follows (citing a good many authorities).

> "The Act to Regulate Commerce provides that the commission shall exercise jurisdiction over the inland portion of the haul, either to or from a foreign country; and it must logically and necessarily follow that the rate which must be filed with the commission under Section 6 of the Act is the rate governing such movements. * * * The rates of transportation from places in the United States to ports of transshipment, and from ports of entry to places in the United States, of properties in foreign commerce carried under through bills of lading, are required to be filed and published by the Amended Interstate Commerce Act. * * *." And see *Armour* v. *U. S.*, 209 U. S. 56.

That part of counsel's brief pertaining to the effect of the Arkansas statute is based entirely upon the idea and argument that when Congress enters the field upon any matter its action is exclusive of that of the State. This statement properly qualified and understood might be correct, but as a generality it is misleading and useless. The question at once arises as to what field is entered by Congress; if it is meant that just because Congress has legislated upon the general subject of commerce, every regulation of the State as to interstate and foreign commerce is prohibited, the statement is absolutely wrong. As early as 1887, Congress passed the Interstate Commerce Act, and yet the action of the State upon various phases of interstate com-

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merce was not interfered with. One of these was the subject of regulation of damages for loss which was not covered by those laws. They covered only the matter specified, such as fixing rates, prohibition of discrimination, etc. In the Croninger case, *sup.*, construing the Carmack Amendment, this is distinctly held, and it is held that prior to that Amendment the subject of loss by carriers was not covered by Federal Statutes in any sense, and that Amendment was held to apply only to interstate shipments. It has been often decided and never disputed that the Carmack Amendment which pertains to liability for loss applied only to interstate commerce and nothing more. How it can be claimed that the Carmack Act which covers the ground only of loss in interstate shipment and the Cummins Acts extending it to commerce with adjacent foreign countries cover also the field of loss in case of commerce with non-adjacent foreign countries is beyond our comprehension. Certainly counsel does not claim that these three kinds of commerce are the same. Certainly the inland haul of commerce like this is not governed by the Carmack or Cummins Acts, but by the common law and State laws modifying same as to loss or damage. It certainly cannot be said that Congress in providing a rule of damage in interstate and adjacent foreign shipments has entered the field and provided a rule of damage in shipments like this. The cases in the Federal Supreme Court which lay down the rule as to the conflict in Federal and State laws in matters of commerce are very numerous and it is not necessary to cite many of them, as it is nowhere held that State action is prohibited except where the particular subject matter has been provided for by Congress. We will first notice the cases cited by counsel on this, and will easily show that not one of them bears out his contention, but fully bears out ours. We will also cite other cases which illustrate the rule.

In *Ry* v. *Commrs.* 236 U. S. 439, cited, the Federal statute required grab irons on the sides *and* ends of cars, while the Indiana statute requires them on the sides *or* ends. Of course it was held that the former covered the field of safety appliances on cars and was exclusive. The case bears no resemblance to the instant case, where Congress has entered the field only as to loss in interstate shipments and those to and from adjacent foreign countries, and as seen, did not do that even until the Carmack and Cummins

Amendments were passed, prior to which time, as we have fully shown, such loss was governed by State law, or by the common law in case no State statute existed, although the field of legislation in other respects had been entered as early as 1887. Counsel seems to think that liability for loss is the same field as that for discrimination and various other matters of regulation, and that liability for loss in interstate commerce or commerce with an adjacent foreign country is the same as liability for loss in commerce like this. But, as seen, these are distinct fields, and Congress and all the courts have so treated them. We defy counsel to cite a single case or statute, State or Federal, showing that Congress has entered the field of regulating liability for loss in case of shipments like this.

In same way the case of *Rd. Co.* v. *Winfield*, 244 U. S. 147, cited, sustains us and not him. There the Federal Act fixing the liability of interstate carriers to their employees distinctly confines all such liability to cases of negligence and necessarily excluded all State laws on the subject, whether based on negligence or not. The field was completely covered by the Federal Act. Counsel cannot show, as stated, a single Federal Act covering expressly or impliedly the matter of loss by carrier of shipments like this; he can show nothing except an act governing loss of interstate carriers or carriers to adjacent foreign countries, which is a subject as far removed therefrom as is one pole from the other. The very expression in the statute of one excluded the other.

Railway v. *Reid*, 222 U. S. 424, cited, was a clear case of a State law attempting to interfere with an interstate shipment, and a glance at the opinion will show that it sustains our position in every respect.

In case of *Mo. Pac.* v. *State*, 222 U. S. 370, cited, the State passed an "hour of labor" statute almost identical with that passed by Congress, but the latter did not go into effect until one year after its passage. The latter was admitted to be exclusive, and the case is not in point here. The contention was as to whether the act was exclusive during the year after its passage, and it was held so to be.

In the case of *Ry.* v. *Public Serv. Comm.*, 242 U. S. 255, the State headlight law was attacked as being superseded by the appliance act of Congress. The court cited the case

of *Railway* v. *Georgia*, 234 U. S. 280, as holding to the contrary, but declined to decide the case because no Federal question was raised.

It is hard to see why *Rd. Co.* v. *Varnville*, 237 U. S. 597 was cited, as it holds just as we have reiterated that the Carmack statute covers the subject of liability for loss in case of interstate shipments, and that a law of the State in conflict therewith was void.

The cases of *Ry.* v. *Rankin*, 241 U. S. 327; *So. Exp.* v. *Byers*, 240 U. S. 612, and *Ry.* v. *Starbird*, 243 U. S. 592, cited on this point, are cases of loss in interstate commerce clearly taken out of State control by the Carmack and Cummins Acts, as are all the others cited on this. Why does he not cite a case holding that the inland haul of a shipment like this is governed as to liability for loss or damage by Federal laws? He cannot do so, for the cases on the subject (we have already cited them) hold to the contrary. Counsel throughout his brief naively speaks of Congress entering the field of "foreign commerce" and says the Cummins Act covered that field by extending the Carmack Act to commerce with adjacent foreign countries. The different kinds of commerce are not recognized. It is the first time we ever heard that an act passed on one subject would govern as to another distinct and unrelated subject. No authority is needed to refute such a fanciful idea; but those cited by counsel refute it by holding that the exact subject-matter of the State Act must be covered by the Federal Act or the former remains in force.

"This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Ry.* v. *Haber*, 169 U. S. 613. "These cases recognize the established rule that a State law enacted under any of the reserved powers especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject." *Ry.* v. *Harris*, 234 U. S. 412. "The test, how-

ever, is not whether the State legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control." *Meeker* v. *Rd.* 236 U. S. 434. (Congress in its legislation has not even mentioned the kind of commerce here involved, and of course, has not exerted exclusive control over it). "Congress has not by any statute covered the whole subject of the transportation of live stock among the several States, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the States of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases." *Reid* v. *People*, 187 U. S. 137. These are mere examples of the statement of the rule by the highest court.

As stated, the cases on this are many, and not one lends aid to the view that Congress has entered the field of regulation of loss in shipments like this. Every case that counsel has cited or can cite necessarily sustains our position. We may cite additional cases holding that State laws are in force because Federal laws have not occupied the field as follows: *Ry.* v. *State*, 219 U. S. 453, as to number of men on a train; *Rd. Co.* v. *Georgia*, 234 U. S. 280, as to headlight; *Rd. Co.* v. *Alabama*, 128 U. S. 96, as to examination of trainmen; *Rd. Co.* v. *People*, 165 U. S. 628, as to manner of heating trains; and as stated, there are numerous such cases.

So when it is said that the field of regulation of foreign commerce has been covered by the Cummins Amendment, and that while that is confined to commerce with adjacent foreign countries the silence of Congress as to commerce with non-adjacent foreign countries makes it exclude State regulation of the latter, an egregious error is committed. As seen, the Carmack Amendment covered only interstate commerce and it required another act, that is the Cummins Amendment, to extend it to commerce with adjacent foreign countries; but counsel now extends it to non-adjacent foreign countries without any further act of Congress. He makes both kinds of foreign commerce the same, whereas they are as different as night from day and are so treated by Congress and all the decisions. See *Galveston etc.* v. *Woodbury*, 254 U. S. 357. Domestic bills of lading are used for the one but not for the other.

Railroads which run trains across the border into countries like Canada can easily be and have been regulated by those acts as to liability for loss, but we cannot regulate ocean carriers of export and import shipments, and we have not attempted to regulate by national law the matter of liability for loss by inland carriers of such shipments to or from the ports. As seen, the Carmack and Cummins Acts have often been held not to apply to such shipments, and this is shown indeed by the express words of the acts themselves, yet counsel in disregard of those decisions and the express provisions of the statutes says they exclude State regulations or such shipments. This they could not do unless they applied to such shipments.

It is noticed that counsel says if Congress enters the "field of regulation" of commerce that excludes state regulation. We might ask "regulation in what respect?" There are many hundreds of distinct matters of such regulation by Congress and by the States, and it is only where they occupy the same specific ground of regulation that the latter gives way. All the cases on this so hold, as seen. We have cited cases holding that notwithstanding the many regulations of commerce in its various phases, the field of liability for loss in shipments was not covered even as to interstate shipments and those to adjacent foreign countries until the aforesaid acts were passed. So it is impossible to say that the field of loss in shipments to or from non-adjacent foreign countries has been covered unless those acts cover it, and, as seen, they do not do so.

Inasmuch as the field of loss or damage in commerce like this has not been entered by Congress, and is not covered either by its express acts or by its silence, all arguments of counsel based on this premise must fall to the ground. Counsel argues that as Congress has entered the field in question, but has remained silent as to regulation, the regulation is furnished by the common law as interpreted by the Federal courts.

We think the rule as to silence of Congress has been misapplied by counsel, for when Congress speaks and occupies a certain field, as counsel says has been done here, there is no silence. It is not a case of silence but a case where Congress must speak distinctly upon the subject to the exclusion of the voice of the State. But, as seen,

Congress has not spoken at all upon liability of carriers in cases like this. Counsel has confused, as it seems to us, the true rule as to silence of Congress with the rule as to conflict in State and Federal regulations where both speak in conflict, and then Congress occupies the field. The true silence rule is that where Congress has not spoken at all, but the State by taxation or other regulation has attempted to impose a burden upon commerce. *State* v. *Gas Co.*, 265 U. S. 298. There the silence of Congress restrains the State from making the regulation, but where the State's action, as here, is not a burden upon commerce, then it must stand unless Congress has spoken to the contrary on the same matter of regulation.

In many of the cases we have cited the fixing of a rule of loss was specifically held a matter of remedy and not a burden on commerce. The mere fact that the Iowa statute was held valid in the Solan case shows that it was not a burden on commerce, and by the same token the Arkansas statute is not, but it is a valid State regulation, except as to interstate shipments and shipments to adjacent foreign countries which have since been regulated by Federal law. It is enough on this to repeat that prior to the Carmack Act all suits for loss in interstate shipments were governed by State laws, as all pertinent cases declare and none dispute; and the same was true of loss in shipments like this and is still true of them because Federal laws have not taken control of the latter as they have of the former.

Counsel's contention being, as seen, that although Congress has passed no law regulating liability for loss in shipments like this, yet it has entered the field by passing the Cummins Acts regulating loss on an entirely different kind of shipment, and that the law regulating this shipment must be found in the Federal decisions, he might as well say Congress entered the field of liability like this when it passed the Carmack Act, for it took over by that act liability for loss in another kind of commerce, that is interstate commerce. It is all commerce, and the field of regulation of loss in commerce with non-adjacent foreign countries like this is as nearly taken over by the Carmack as by the Cummins Acts, as neither touches it at any point. We have already shown that Congress can enter a field only by passing an act taking over the particular field entered. The Federal courts cannot take it over, as counsel would have

us believe. His theory of Congress entering a field without an act exclusively covering it and taking it away from the State is unsupported by any decision, State or Federal. And it is without reason or logic to sustain it. But let us follow it up a little. He admits that the Carmack and Cummins Acts do not regulate liability for loss in shipments like this. He must say this or the Federal statute itself would render this exemption illegal and void. Then if Congress left this kind of shipment out of its regulation of loss, how was it taken away from the State? He is forced to say that the Federal courts, without any act of Congress, have robbed the State of this power and have set aside its statute legally passed. Such a result would, to say the least, be monstrous. All pertinent cases declare that those courts not only cannot do such a thing, but that where no paramount act of Congress intervenes (and counsel admits there is none here) they will enforce the State law as they find it, whether such law be statutory or the product of State decisions. It is only where neither is shown to exist that they will make a law of their own as in the Hart case, 112 U. S. 331, cited by counsel. (And that case did not involve exemptions from loss like this, but involved the validity of released value contracts in case of negligence). Counsel's quotation from the Croninger case condemns his theory utterly. It is there held that both Federal and State courts will follow a State statute regulating liability as that in the Solan case did (and as this one does). This is conclusive that the Federal courts would follow the Arkansas statute on liability instead of setting it aside, as counsel argues, there being no paramount Federal law, and the question of following a common law rule or a rule of their own which counsel discussed does not arise. His position when stripped can mean only that a Federal court would be bound to follow the Hart case or the Cau case, 194 U. S. 427, as to carrier's liability in this case, instead of enforcing C. & M. Dig., Secs. 843-4, which we all know is not the case, and know that it would enforce our State statute instead. Not only this, but without a State statute, as seen, they follow rules of liability established by State courts when no controlling Federal statute intervenes. *Ry.* v. *Hughes*, cited in Croninger case. In the Hughes case the court said: "We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a

statute or resulting from the rules of law enforced in the State courts."

The cases of *Cau* v. *Ry.*, 194 U. S. 427, and *Arthur* v. *Ry.*, 204 U. S. 505, cited, were decided, the one before and the other upon facts arising before, the statute in question was passed, and of course the court construed the common law rule to suit itself; but if our statute had been in existence, then according to the Solan case and the others cited, the Supreme Court in those cases would have been bound by and would have followed our statute. In *Rankin* v. *Ry.*, *supra*, the court says "the essential choice of rates must be made to appear." And same is held in 236 U. S. 278. (*Pierce* v. *Wells Fargo*). These later cases seem to conflict with above two cases.

The case of *Simmons Hdw. Co.* v. *So. R. Co.*, 279 Fed. 929, is here cited as showing that an exemption from loss by riots was held valid. That shipment was interstate, and as the loss occurred July 2, 1917, the second Cummins Act controlled and no exemption could be valid except those allowed at common law, among which riots was not included, and only one rate was allowable for a full liability contract, although a released value contract would then as now admit of another rate. The shipment there was made under a bill of lading framed by the commission before it was held in McCaul-Dinsmore case, in 253 U. S. 97, that no exemption from common law liability could be allowed under the Cummins Act, which may account for the illegal exemption being found in the bill of lading. Those framed since the decision just cited no longer contain the exemption from loss or damage on account of riots, but only an exemption of loss or damage from *delay* caused by riots or strikes, which is an exemption allowable under the commonlaw. The court held the exemption from loss by riots valid under the Cummins Acts in the face of the case last cited by saying that those acts apply not to a loss exempted by the bill of lading, but only to valuation in case of loss for which the carrier is lawfully liable. But the cited case from the Supreme Court and all others on the subject hold that those acts prevent all exemptions of liability for loss or damage by bill of lading except those allowed at common law. The court then says that were it otherwise the last Cummins Act excepts property (except ordinary live stock) concerning which the carrier is authorized by the

commission to establish rates dependent on value declared in writing, etc. But this merely legalizes released value contracts which the first Cummins Act had prohibited and makes the value agreed on by the parties binding. It has no reference to the prohibiting of restrictions of full liability for loss or damage except as allowed by the common law. A writ of error was taken from this erroneous decision, but it was dismissed in Supreme Court because not filed in time.

That part of counsel's brief which invokes Sec. 25 of Interstate Commerce Act (added by Transportation Act of February 28, 1920) is easily answered. That section in terms applies only to shipments in American registered vessels, while the shipment in question here was billed for shipment in an English vessel. At that time, as shown by said rule 1, there had been no form of export bill of lading prescribed for this territory, but the carrier's export bill of lading was the only one in use for this shipment. This bill of lading the carrier could and did frame to suit itself. The Commission had nothing to do with it. Prior to February 28, 1920, it had been held that the Commission had no power to prescribe a form of bill of lading for either domestic or export traffic. *U. S.* v. *Alaska Steamship Co.*, 259 Fed. 273, 253 U. S. 113. On October 21, 1921, just a year after this shipment was loaded and burned, the Commission prescribed a bill of lading under said section 25, dealing, as expressly stated, "Only with the through export bill of lading for shipments to non-adjacent foreign countries, to be issued by carriers subject to the Interstate Commerce Act in connection with ocean carriers whose vessels are registered under the laws of the United States." Export Bill of Lading, 64, I. C. C. 347. It is seen from this that there was no form of bill of lading applying to this shipment except the carrier's bill as above stated, and when one was prescribed it did not apply to a shipment in foreign bottoms like this.

> "The mere creation of the Interstate Commerce Commission and the grant to it of a measure of control over interstate commerce does not of itself and in the absence of specific action by the Commission or by Congress itself, interfere with the authority of the States to establish regulations conducive to the welfare and convenience of their citizens, even though

interstate commerce be thereby incidentally affected, so long as it is not directly burdened or interfered with." *M. K. & T. Ry.* v. *Harris*, 234 U. S. 412, and other cases.

So it is seen that if counsel were correct in his contention, the Commission not having taken action in the matter until long after this shipment was loaded and burned, and then not as to shipments like this, it could not be controlled by that provision.

Our next duty is to show that even if our statute did not exist, the exemption in question is without consideration and void. The rule is that a carrier primarily owes to the shipper the duty to carry goods under its full common law liability by which it becomes an insurer except as to losses caused by the act of God, the public enemy, and some other exceptions. It follows as a matter of course that any limitation of this liability must be paid for by the carrier, that a consideration must be given, the usual consideration being a lower rate for the restricted liability. In determining whether this lower rate was afforded in this case we must have in view the fact that this shipment involved the schedule of rates and other provisions of the Federal laws.

It is stated in 10 C. J., page 149, that the carrier "must hold itself out as being in readiness to transport the freight with or without such limitation and allow the shipper the choice between the limited liability contract and one imposing on the carrier the full common law liability, and if this is not done the contract is void and the limitation is inoperative. * * * The question is not what the contract recites in respect to the matter, but whether he (the shipper) had in fact the chance to choose between his common law rate and a lower rate with limited liability." The cases supporting these statements are almost innumerable, both State and Federal. The first Arkansas case on the subject is that of *Ry* v. *Cravens*, 57 Ark. 112, and the principle has been announced by our court many times since. In *Ry.* v. *Wells*, 81 Ark. 469, the court said: "No matter what the contract contains by way of recitals or stipulations, if no opportunity for non-restricted service is afforded then it is imposing the restricted contract upon the shipper without his consent." In the case of *Ry.* v.

Rankin, 241 U. S. 317, the court said: "The essential choice of rates must be made to appear. * * * It may become necessary for the carrier to prove its schedules in order to make out the requisite choice." And so in *Ry* v. *Oakley*, 115 Ark. 20, the court held that where the carrier has but one regular rate applicable for given property it is not a reduced or special rate, such as will serve for the limitation of the common law liability. And the same is held in a large number of cases in Missouri and other states. See as an example the case of *Leas* v. *Ry.*, 136 S. W. 963, where the court said:

> "It would be a logical absurdity to speak of a rate on a given class of property as a reduced rate when there is but one rate for such class. The adjective 'reduced' implies a comparison, and, if there is but one rate, with what may it be compared? It is not permissible to go outside of the subject-matter to seek a comparison. The rate on coal may be less than on dry goods, but that fact would not make it a reduced rate. Necessarily the comparison must be made, if at all, with another higher rate on the same class of property, and if there is no such rate there can be no reduced rate."

In this court and in the Supreme Court of Arkansas the rule has been stated in a similar manner, that is, that the shipper must be afforded a choice of rates, and of course, a corresponding bill of lading must be in readiness, and unless this is done any contract exempting from common law liability is null and void. The question then arises whether such a choice was afforded in this case. It is sought to be shown by introduction of a rule in the consolidated freight classification to the effect that if the shipper had called for a full liability contract, the same bill of lading could have been used by stamping certain words on it, and a corresponding rate could have been fixed by adding 10 per cent to the published rate.

To begin with we do not believe that this rule is in force as to export cotton shipments. The rule, it will be noticed, begins with saying "unless otherwise provided," thus leaving it wide open to any exceptions that may be embodied in other rules that may be promulgated and filed with the Commission. It is admitted

by defendant's witness that all the rate sheets and classifications have numerous exceptions which have to be followed out in order to determine what rule is in force. The provisions of the cotton schedules which were effective on the date of this shipment and which was introduced, show conclusively, we think, that the rule does not apply to this shipment. On the front cover of this cotton schedule is a provision worded as follows: "Governed, except as otherwise provided herein, by the Consolidated Freight Classification No. 1 p. 28." This clearly provides for what the rule relied on by counsel permits, that is, an exception contained in the cotton schedules or in the rules promulgated therein, thus excluding the use of rule 1 in case of shipments like this; hence such rule has no application here. At page 39 of the cotton schedule "item 130, bills of lading" is the following provision: (R. 17).

> "(c). Foreign bills of lading are to be used for cotton and cotton linters consigned to other destinations than on the American continent; that is, England, Germany, France, etc. The present form of foreign bill of lading is No. 1168-M and 1168½-M. (d) All bills of lading must be free from alterations or erasures, except as provided for in item No. 115, and must contain a correct description of the cotton or cotton linters covered, including marks, quantity, conditions, etc."

This provision as to export bills of lading for cotton shows that the agent had no choice in the use of bills of ladings for such shipments. It is agreed in this case that 1168½ and 1168½-M are used only for export cotton and 1168 and 1168-M only for other goods (R. 51), so that the form of bill of lading designated in the schedule as 1168-M is not used for cotton, but the one we have introduced shows that its liability provisions are the same as in those used only for export cotton. These forms of bill of ladings are introduced in evidence and may be seen by the court (R. 44). The form actually used in this case is 1168½; the only cotton bill of lading provided for in the schedule is 1168½-M; the only difference in these is that one is printed on one page and made longer while the other is printed on both pages. The rule quoted above which is contained in the schedule and is found under the head of rules and regulations prohibits the agent from making

alterations or erasures, except as provided in item No. 115, which merely requires the agent to write on the bill the condition of the cotton. As testified to by our witnesses, this rule exempts cotton from rule 1, and also prohibits the agent from stamping the bill of lading in the manner required by rule 1.

Now in view of the fact that rule 1 only applies where it is not otherwise provided, and that the cotton schedule is governed by the consolidated freight classification (which contains rule 1) only when not otherwise provided in the cotton schedule, and that the rule we have quoted fixing one bill of lading as the only one to be used as to export shipments of cotton, is under the head of rules and regulations governing shipments of cotton, we must conclude that rule 1 has no application to this shipment. Said item 130 not only prescribes an exact bill of lading for export shipments of cotton, but it provides specifically that said bill of lading shall not be changed in any manner by erasure or alteration, except as provided in item 115, which requires the agent to specify the damage to cotton in the bill of lading. In as much as cotton is a commodity which is largely shipped abroad as well as at home, and requires different rules and methods for proper transportation, it is not surprising that different and separate regulations should be made differentiating cotton shipments from all others, as we think has been done in this case.

We here present some excerpts from the evidence. W. H. Martin testified (R. 19): "Q. How many shipments of cotton do you suppose you made in that territory during—along the period of time you have been there? A. Well, I couldn't estimate it. Q. It would run up into the thousands, wouldn't it? A. Yes, both domestic and foreign. Q. Tens of thousands. Did you ever during that time change a bill of lading that was furnished you by the company by writing anything on it showing a different rate or something like that? Did you have any stamp by which you could change them into a different bill of lading? A. Well, there was a good many stamps, but whether there was applied on that, I couldn't say. Q. You mean stamps with names and dates, and such as that? A. Yes, but whether we had one for what you spoke of, I couldn't say. Q. Suppose a man had come there and had wanted to ship this cotton on a dif-

ferent bill of lading, what would you have done? Could you have furnished him with a different bill of lading than this? A. Yes sir. Q. How could you do it? A. By a clause in the official classification. Q. Well, how would you do it? A. Well, I don't know just how without looking at the clause in the classification. Q. Did you ever do that? A. No sir, I never have. Q. You don't know whether you had any stamp to do it with or not? A. No sir, I don't. Q. You never did write anything of that kind on a bill of lading? A. I never have written anything on them * * * Q. Could you have done that without advice from somebody higher up in the business? A. No sir, I wouldn't have wanted it. Q. You would have wanted to get directions from somebody higher up before you do it? A. Yes, in this case I would. Q. You would have done that? A. Yes, I would if it was requested for the change to be made. Q. Did you ever tell any shipper in the tens of thousands shipments you have made there, that there was a higher rate, and that they could get a different liability and a different bill of lading? A. No sir. * * * Q. Did you ever know of any shipments being made in that territory during the time you have stated, except on these regular bills of lading without anything written on them? A. Yes,—all I have ever issued is the regular bill of lading.

Mr. Burke said (R. 28): I started to say that under the provision of the tariff, Rule 1 in the official classification has nothing to do with cotton. It absolutely states—I think any traffic man will make the same—give the same opinion, in as much as these specific forms of bill of lading are prescribed.

Mr. McGee said (R. 30): Q. Did you ever hear of such a thing as a changed bill of lading by writing or stamping on it to make another bill of lading out of it? A. No sir, I never heard of it until here.

Mr. Aylen, for defendant, says on cross-examination (R. 60): Q. Isn't it a fact that if there are any specific provisions in the rate sheets or tariffs—if they are in conflict with the general provisions that the specific provision would control? A. Yes, they would. Q. You haven't undertaken to say from this cotton tariff here, I believe, that the shipment of cotton for export hadn't been taken out

from under that rule by the provision which has been read here? A. According to my interpretation of the tariff they have not been taken out, no sir. Q. But you would say if there is a specific provision in the rules which is in conflict with the general rule it would control? A. The rules in the individual tariff would take precedence over the classification. Q. Then if the language used in the cotton tariff is such as to show it was an exception to the general rule, it would take it out from under it? A. Yes sir."

The witness Sides (R. 51-3), testified very fully that the cotton schedule is withdrawn from Rule 1, and has nothing to do with it. He confirms in the strongest language everything said by Mr. Burke in this respect, and counsel after a most searching cross-examination was unable to shake him in the least.

Counsel relies on finding No. 2, but as a finding of fact based on the expert testimony introduced it is certainly not sustained by the evidence. And if the court wishes to test this finding by the schedules, rules and regulations introduced, they show on their face that our contentions are correct in every respect. Counsel says that this is a question of construction for the court of the documents adduced. If so, the finding of the court below has no binding force here, and this court must make its own construction from these documents. Counsel confines his objection to our position on this to the question of erasures or alterations of the bill of lading. He overlooks our other point, which is equally clear, that the cotton tariff is not governed by the consolidated freight classification No. 1 (which contains rule 1, providing for optional bill of lading according to counsel's claim) where the former contains exceptions thereto, and it does contain an exception by confining the agent to the use of only one bill of lading.

The testimony shows clearly that the company and its agents and all shippers had construed these rules in the way we contend that they should be construed. The agent stated that he had been employed in the cotton territory by defendant company for years, and has issued bills of lading for many thousand shipments of cotton to foreign ports; that he had never yet issued a bill of lading by writing or stamping upon it the words provided in Rule 1, and

that he had no knowledge of having such a stamp, nor had he ever varied from the schedule of rates by adding 10 per cent thereto. And he went further and said that if he had been called on by a shipper to furnish a bill of lading at a different rate from the regular published rate he would not have attempted to do it without consulting a higher officer of the company. It is true he stated on cross-examination that in such a case he would have endeavored to carry out Rule 1, but this does not qualify his former statements in the matter. In addition to what the agent said, we have the testimony of Mr. McGhee, a shipper of cotton for 30 years, especially export cotton on a very extensive scale, and he says that he never before heard of any rate on export cotton except the regular published specific rate; that he never heard of a 10 per cent increase in rate as a basis for unlimited liability, and that he never heard of and never used an optional bill of lading created by stamping certain words on the regular printed form furnished him by the company for export shipments of cotton. In addition to this we have the testimony of Mr. Burke and Mr. Sides, two expert traffic men of long experience, and who have served also as railway freight agents, and they say that the construction which we have placed upon the rules in the cotton schedule is correct, and that cotton is taken out from under rule 1 by these rules. The expert introduced by defendant simply stated in a general way that it is customary for the railroad company to have various stamps for use in issuing bills of lading. These of course include dates, names, etc. But he did not once state he had a stamp containing the words provided for in rule 1.

To show the absurdity of the rule as now used, its application to interstate shipments was absolutely abolished by the Carmack and Cummins Amendments. In other words, those statutes absolutely prohibit any bill of lading except one carrying full common law liability for interstate shipments and probihit any optional rate of the kind sought to be provided for in rule 1, that is one rate for a limited liability exempting loss by fire, etc., and one rate for common law liability. And yet they carry forward this rule as if it had full force to this today and in connection with interstate shipments; and the defendant's witness went so far as to say that the rule still has full force and effect in

regard to interstate shipments, thereby showing that he knew nothing about what he was testifying to in that regard.

To further show the fallacy of rule 1 as now sought to be used, we may state what is well known to be a fact, that it has been carried forward as applying to interstate shipments under the new uniform bill of lading now in use. This bill of lading itself enforces full common law liability, and it could not do otherwise and have legal effect. See McCaul Dinsmore case, *supra*. Yet by rule 1 the company could charge 10 per cent more for full common law liability when it is already bound to that liability by the bill of lading itself, and there is no consideration for the 10 per cent added to the rate published in the classification alongside of rule 1.

In Traffic Law, Section 2017-F, the writer says:

> "The obvious effect of the Cummins Amendment of March 4, 1915, to section 20 of the Interstate Commerce Act providing for liability for the full actual loss, damage, or injury to the property transported notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission, is to nullify the dual system of classification and rate making as above described as far as it relates to interstate and foreign commerce. * * * Therefore, in so far as interstate and foreign commerce are concerned, the ratings provided in the Consolidated Freight Classification have automatically attached to them, by virtue of the 'Cummins Amendment' the carrier's full common law liability as imposed by section 20 of the act; and all provisions with reference to limitation of liability and which seek to impose ten per cent higher ratings when the property is not shipped subject to the carrier's terms and conditions, are null and void. It should be noted, however, that the Consolidated Freight Classification is filed with numerous State regulating tribunals throughout the Official, Southern and Western Classification Territories for use on intrastate traffic, and for this reason, *the dual system of ratings provided in the Consolidated Freight Classification is still lawful with respect to*

purely intrastate traffic, except in so far as they may be contrary to the law, rules, and regulations of the several States in which such classification is in use."

Going back to the rule that the shipper must be afforded a choice of rates, we must conclude that he was not here afforded such choice. The rule relied on makes it his duty to call for a different rate and a different bill of lading and places the burden upon him to do so. And yet the agent says that he could not have furnished a different bill of lading without consulting an officer higher up or that he would not have been willing to do so, which means the same thing. How can it be said that one shipper among many thousand shippers for a period of 30 years would hit on the idea or would have knowledge enough of traffic rules to know that he might ship at a full liability rate, when experienced rate men say that, taking the rules together, rule 1 does not apply to shipments of cotton, and how can an ordinary shipper be expected to take notice of the true meaning of any such rules, and to be required either to ship at a limited liability or call upon the agent for a different rate and a rate which no shipper ever heard of?

Not only was there but a single rate for this shipment (in as much as rule 1 did not apply to it) and as seen, but a single bill of lading provided, but the bill of lading here used was not filed with the Commission and was not printed in the freight classification or schedules posted by the company, and hence it was never officially recognized by the Commission. The rule calls it a carrier's bill of lading, and not being on file, notice of it could not be taken by the shipper, and the rule alone could not notify the shipper of any choice of rates, for he could not know that the bill of lading would or would not give him full liability protection. Most of the cases say that the choice must be actually presented to the shipper, but here it is sought to impute knowledge of the choice to the shipper from the printed matter on file. If so, then this matter must all be filed and posted. This was not the case here, for, as seen, the bill of lading was not contained in the classification or schedule and knowledge of its provisions could not be imputed to the shipper.

But if we assume for the sake of argument that constructive notice of rule 1 was sufficient to impute knowledge of the choice and that rule 1 governs this shipment, yet we

do not believe from the testimony of the agent and others in this case that the shipper was afforded the choice of rates and corresponding bill of lading required to bind him to a restricted liability. In this connection we wish to cite the case of *Hill Mfg. Co.* v. *Ry.*, 78 So. (Miss.) 187. There the notice to the shipper of his so-called right to an optional rate and bill of lading was contained in the bill of lading in words similar to those of rule 1 herein, to-wit:

> "The rate named herein is a reduced rate given in consideration of the shipper entering into the contract set out below. If the shipper prefers that the shipment shall be transported at the carrier's risk, limited only as provided by common law and the laws of the United States, and of the several States in so far as they apply, he can accomplish that result by notifying the carrier's agent, and shipping at a rate of 20 per cent higher than the rate indicated here with a minimum increase of one per cent per hundred pounds."

The bill of lading exempted loss by fire. The court said:

> "Coming to the second question, we think that the company is liable as an insurer under the common law rules governing carriers. It is clear from the agent's testimony and from the bill of lading introduced in evidence that there was no alternative rate at the Houston, Miss., office, and if the shipper had demanded a rate other than the one here in evidence the carrier would wholly have been unable to furnish a bill of lading. The agent undertakes to say that if the shipper had requested a higher rate he would have taken up the question with his superior officer and have ascertained whether he could have furnished such rate. We think that it is the duty of the railroad company to have the bill of lading at its office where the shipper applied in order to bind the shipper in a contract for a limited liability. The shipper does not have to wait until the agent can communicate with a foreign office or go to other places to find a bill of lading." Certiorari to U. S. Supreme Court denied.

It will be noticed that in that case the agent admitted that he would have been unable to furnish an optional bill

of lading, but that he would have had to communicate with his superior officer. The rule as stated by this court and Supreme Court of United States is that he must be in readiness to afford another rate and another bill of lading, and the agent's statement here, just as in the Mississippi case, shows that he could not have done so. As said by the Mississippi court, the bill of lading should be ready in the agent's office where the cotton is shipped and the shipper does not have to wait for the agent to communicate with a foreign office before receiving his bill of lading.

Counsel stressed the fact in evidence that the shipper filled out the bill of lading. But this is immaterial where it and the rate furnished by the carrier and no other is available as was the case here. Furthermore, in all the cases on that subject the limitation of the carrier's liability was valid and would have been enforceable had the contract been prepared by the carrier. Of course if the limitation against loss by fire is void under the law it is immaterial whether the bill was filled out by the shipper or the carrier.

Counsel says the words to be stamped on the bill of lading as per rule 1 do not constitute an alteration, but constitute an addition, according to the ordinary meaning of words. But according to rule 1 this stamp entirely changes the meaning of the bill of lading and makes a new bill of lading out of it. This could not be an addition, for that would leave it as before with the exception of the added words. It is an alteration if there ever was one, for it completely changes the meaning and effect of the instrument.

Counsel says too that our argument would do away with the addition of weights, descriptions, etc. Not at all. There are blanks in the bill and it is intended that same shall be filled out.

We see no mention in counsel's brief of our contention that even if the shipper must take notice of the classification and the schedules neither contained the carrier's bill of lading which was used and that he could not have known without this that he was allowed an optional rate and an optional bill of lading and therefore was not put on notice of his rights in that respect. According to the Mississippi and other cases which we cite, the agent could not have furnished an optional bill of lading because he must have

been in readiness to do so, and he admitted that he could not have done so by stamping the only bill of lading which he had, without taking time to communicate with his superiors, and he had no such stamp or they would have proved it. This was undoubtedly a denial of the right of the shipper to an unlimited liability contract, or at least it was a failure to afford him such a contract, which was the same thing.

Returning to Rule 1, it was placed in the classifications before the Carmack or Cummins Amendment was passed. When those acts prevented the use of any bill of lading except one for full liability and the use of any rate except a specific published rate based upon that liability, it was held by the interstate commerce commission that the dual rate and the 10% differential as contained in rule 1 automatically passed out of existence, the reason being that the specific rate then published had to be applied to the full liability contracts and could not be applied to the 10% increased rate which could not stand alone. As stated by the commission in matter of released rates 13 ICC. Rep. 550: "The lawful rates on file at this time therefore are the rates providing for the limited liability. The Cummins Amendment, by making contracts limiting liability for loss caused by the carriers unlawful, does not destroy these rates, but they remain in effect and are lawfully applicable, for the 10% increased rates are merely additional and cannot stand in and of themselves." See also quotation from Traffic Law, Sec. 2017 F. Sup., where the writer states that rule 1 is abolished by the statute except in so far as it may apply to intrastate shipments.

The proof here shows there was but one rate from Earl to Brunswick for both interstate and export shipments. The full liability rate was obtained by adding 10% to this rate, but these amendments caused this rate to be the full liability rate as to interstate shipments, the 10% increase being dropped. Then as the interstate rate was the same as that for export shipments, the 10% was necessarily dropped for export shipments, leaving the published rate for full liability in those shipments and making it necessary to fix a lower rate or a rate which was a certain percentage lower than that rate for limited liability. No such rate was fixed, but the old rate was retained and is now sought to be used as a lower rate for limited liability

whereas it is the rate for full liability as above stated. The most that could be said would be that if dual rates fixed by rule are still allowed as to export shipments, a new rule fixing the limited liability rate at about 10% less should have been made instead of still using the old rule which adds 10% to the old rate to obtain a full liability rate, and that if the present rule 1 is to be applied, a new rate should have been fixed for export shipments, to which 10% could be added to obtain a full liability rate. This has never been done. The result is they had no optional rate for export at Earl. They had the old dual form whose specific published rates attached only to full liability and they offered no less rates for the limited liability. They could not offer less rates for limited liability without a new rate for export shipments as the rate they furnished was an unlimited liability rate for interstate shipments between same points as seen.

Although not essential to our argument, we do not believe that under the later provisions of the Interstate Commerce Act and the decisions thereunder the carrier of a shipment like this can afford a choice to the shipper by any device such as rule 1 or otherwise than by giving a complete published specific rate for the full liability and another for the limited liability with a corresponding bill of lading for each rate thus established.

At the time the Oakley case, *supra*, was decided the Cummins Amendment had not been passed, and the carriers all over the country were assuming to use rule 1 as a means of furnishing optional rates and contracts in interstate shipments. The court in that case said:

> "The record shows that there was only one tariff rate from Rogers, Arkansas, to Skiatook, Oklahoma, over the route the apples were shipped, and that the shipper paid that rate. Therefore, there was no reduction in the rate of freight charged as a consideration for restricting the liability of the carrier or for fixing the measure of damages other than that imposed by the common law."

So it is seen that rule 1 was disregarded in that case and the published schedule rate was treated as the only rate. In the same way the Supreme Court of the United

States in a case (*U. P. v. Burke*, 255 U. S. 317) involving the inland haul of an import shipment wherein rule 1 as here was a part of the classification (see report of the case in 124 N. E. 119) ignored rule 1, and placed the decision upon other ground. The shipment was from Japan to New York by way of San Francisco; the inland shipment was over the Union Pacific; the court, among other things, in that case said:

> "The petitioner was an interstate common carrier by rail at the time of the shipment involved, and as such had filed with the Interstate Commerce Commission schedules of rates and regulations under which the property was moving at the time it was destroyed. By these schedules the carrier was bound, and to them it was limited, in contracting for traffic. *Southern Railway* v. *Prescott*, 240 U. S. 632, 638. The statute expressly provided that it should not charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than such as was specified in such schedules." (The valuation clause in the bill of lading is then set out). * * *
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> "To this contention it is replied by the respondent: That it is admitted by the petitioner that its filed and published schedules contained but one rate applicable to the shipment as it was carried east of San Francisco; that that rate, $1.25 per 100 pounds minimum carload, was charged in the Yokahama bill of lading; and that, since no choice of rates was given, or could be given, to the shipper, any agreement, in form a valuation of the property, made for the purpose of limiting the carrier's liability to less than the real value thereof, in case of loss by negligence, was void and without effect." * * *
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> "Having but one applicable published rate east of San Francisco, the petitioner did not give and could not lawfully have given the shipper a choice of rates, and therefore the stipulation of value in the Yokahama bill of lading, even if treated as imported into the uniform bill of lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law."

In *Ry* v. *Carl*, 227 U. S. 639 (an Arkansas case) the court said: "The lawful rate is that which the carrier must exact and that which the shipper must pay." In *Ry.* v. *Hooker*, 233 U. S. 97, the court said: "It was the purpose of the act to have but one rate open to all alike from which there could be no departure." In *Ry* v. *Maxwell*, 237 U. S. 94, the court said: "The rate of the carrier duly filed is the only lawful charge. A deviation from it is not permitted under any pretext." In the Armour case, 209 U. S. Sup., the court said the Elkins Act was intended "to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same conditions, should be the one established, published, and posted as required by law." In *Ry.* v. *Fink*, 250 U. S. 577, the court said: "The purpose of the act to regulate interstate commerce, frequently declared in the decisions of the court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the commission."

In *Poor* v. *Ry.*, 12 ICC. Rep. 469, it is held that under the force of the interstate commerce act, the published rate has taken on a fixed and rigid character that does not permit it to yield either to importunity or to mistake. Regardless of the rate quoted or inserted in a bill of lading, the published rate must be paid by the shipper, and actually collected by the carrier; when once lawfully published, a rate, so long as it remains uncancelled, is as fixed and unalterable, either by the shipper or by the carrier, as if that particular rate had been established by a special act of Congress. Same has been held by U. S. Supreme Court.

Now if a schedule of rates is a statute binding both parties not to take or receive "more or less or different compensation" (as the statute provides) from that provided in the schedule or tariff, then such a statute cannot be put in force by rule of the company, but only by a schedule filed and published as required by law.

Their only answer to this contention is the citation of *Ry.* v. *Harriman*, 227 U. S. 657, and *Ry.* v. *Rankin*, 241 U. S. 319. But these were cases of released values in stock shipments decided under the Carmack Amendment and such shipments are not covered by the Cummins

Amendments. Under the Carmack Amendment released value contracts were permitted under the Federal decisions by merely stating what the rate would be for each value declared. Here the question is not one of released valuation but one of a common law or limited liability. We have shown that no optional rate was here furnished for a limited liability, and this avoids the limitation in question. We go further and contend that if such a rate were furnished for the shipment in question it would have to be by separate specific rates for each of the two liabilities, and the above cases are not in point on this.

In the case of *Hill Mfg. Co.* v. *Ry.*, 78 So. 187 *sup.*, the provision for an alternative rate, as seen, was contained in the bill of lading which operated as strongly as the rule here relied on to afford such a rate. The court in speaking of such rate said: "However, it appears to our satisfaction that there was no such rate at any office of the railroad company, because the railroad company had never filed any such rate with the Interstate Commerce Commission as required by law." Counsel says the court's decision was based on the fact that the company had never filed such rate with the Commission as required by law. But there was one rate filed, as stated in the opinion, and the rate above spoken of by the court was the optional rate which counsel says can be fixed by rule. Yet the rate in that case contained in the bill of lading was held insufficient for the purpose.

Counsel argues that although the specific published rates are as we stated, the same thing as rates specifically fixed by statute, yet that a rate established by an interminable series of rules and regulations by reference to other rates which the experts themselves differ about will be the same as a specific statutory rate. With all deference we do not believe any such thing. If Congress were fixing a specific rate it would do so in figures for each point and would not do so by a complicated system of references which few can be sure of and about which the experts are at loggerheads.

Counsel says the fact that of the thousands of shipments of cotton mentioned in the evidence not one was shipped except under the published specific rate and under the limited liability contract is not evidence that another

contract and rate could not have been given. We beg to say that the decisions on the question are to the contrary and there are many of them. When plaintiff asked for bills of lading to use in making shipments none were furnished, except those containing limited liability, and no rate was given to be filled in except the one published rate and this occurred to other shippers in thousands upon thousands of cases. If this doesn't tend to show that no other method of shipment or rate or contract was available nothing could do so. In *Ry.* v. *Stone*, 79 S. W. 1031, as an example, the court held that evidence of shippers that a carrier had never offered them any contract except one of limited liability tended to show that it did not hold itself ready to make a contract assuming common law liability.

We believe that we are entitled to a judgment, both because our statute prohibits the exemption clause relied on by defendant and the statute is not superseded by Federal law, and because if the above were not the case defendant has not shown that it afforded an optional contract and an optional rate such as the law contemplates, which would constitute a valid consideration for a limited liability.

Respectfully submitted,

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